No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, HAWAII, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEW MEXICO, NORTH CAROLINA, VERMONT, WASHINGTON, WEST VIRGINIA, THE DISTRICT OF COLUMBIA, AND THE TERRITORY OF THE U.S. VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The amici States operate systems of public colleges and universities to educate their citizens and others, and prepare them to be productive and valuable contributors to the workplaces and communities of their States, of the Nation, and of the world.[1] Although amici's institutions of higher learning vary widely in the challenges they face and the goals and priorities they seek to pursue, the amici States all share a strong interest in preserving the flexibility of their varied institutions to pursue a range of strategies to achieve the educational benefits of diversity in higher education.

Every State in the nation operates a system of higher education—from California, with 148 public institutions of higher learning; to New York, with seventy-eight; to Rhode Island, with three.[2] States provide an array of postsecondary schools, including two-year community colleges, four-year colleges and universities, research and doctoral institutions, and professional, vocational, and technical schools. The missions of these schools differ significantly, as do their resources, their governing structures, and the characteristics of the populations they serve.

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[1]Amici the District of Columbia and the U.S. Virgin Islands are not States but operate their own systems of public higher education, and therefore also have a strong interest in the issue before the Court. In addition to the States that join this brief, a number of other States are represented by briefs expressing similar views filed either on their own behalf or on behalf of their state universities.

[2]U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics: 2011*, at 409 (tbl. 280), *available at* http://nces.ed.gov/pubs2012/2012001.pdf ("*2011 Education Statistics*").

Indeed, a single State's system of public higher education typically includes a wide variety of institutions. For example, the State University of New York system includes institutions ranging from major research universities to four-year colleges to community colleges. These diverse institutions are located in rural, suburban and urban areas; have varying degrees of selectivity; and draw from markedly different applicant pools.

Overall, public universities and colleges enroll the vast majority of Americans pursuing postsecondary education. In 2009-2010, for example, such institutions enrolled about seventy-two percent of postsecondary school students nationally.[3] For students of moderate means, public schools play an especially important role: the average expense of attending a private undergraduate college is almost three times greater than the cost of the public equivalent.[4]

To successfully fulfill their long-standing role in providing public higher education, States must have the freedom and flexibility to create strong institutions tailored to the needs of each particular State and its citizens. In striving to meet these objectives, the amici States have learned, through decades of experience, that the existence of a diverse educational community enriches the learning environment for all students and better prepares them to excel in a heterogeneous world.

The amici States recognize that because of our nation's history of slavery and segregation enforced by law, the Constitution limits how racial classifications may

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[3] *2011 Education Statistics*, supra, at 291 (tbl. 199).

[4] *2011 Education Statistics*, supra, at 4.

be used, even when those classifications are intended to broaden the intellectual discourse and further the goals of equality and democracy. Consequently, the amici States have worked to formulate admission policies that promote diversity in a manner consistent with constitutional requirements. In doing so, state colleges and universities across the nation have relied for more than three decades on the guidance provided by this Court in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), and for nearly a decade on the further guidance provided by *Grutter v. Bollinger*, 539 U.S. 306 (2003). Amici States urge this Court to reject petitioner's invitation to alter that guidance (Pet. Br. 24), and thereby destabilize the careful judgments that each State has made in light of the conditions and needs facing its own particular institutions of higher learning.

BACKGROUND

The University of Texas at Austin (UT)—like many of the public colleges and universities operated by the amici States—has a decades-long history of working to ensure that its undergraduates experience the educational benefits of diversity. For many years, UT's undergraduate admissions process focused largely on standardized test scores and high school class rank, but also considered applicants' racial and ethnic background to achieve greater diversity in its academic community. Pet. App. 15a-16a.

In 1996 the United States Court of Appeals for the Fifth Circuit decided *Hopwood v. Texas*, which held in broad terms that UT's law school could no longer consider applicants' race in the admissions process in any way or for any purpose. 78 F.3d 932, 962 (5th Cir. 1996). Following

the *Hopwood* decision, UT stopped taking race into consideration in its undergraduate admissions decisions also. S.J.A. 41a. This change led to a large decrease in the enrollment of African-American first-year students, and a smaller but still significant decrease in the enrollment of Hispanic first-year students. Pet. App. 19a.

Thereafter, UT and the Texas Legislature adopted two main strategies that, while race-neutral on their face, were designed to achieve racial and ethnic diversity at the institution. First, the Legislature enacted the Top Ten Percent Law, a mechanical rule requiring the State's public colleges and universities to admit any Texas high school senior who was in the top ten percent of his or her graduating class. Tex. Educ. Code § 51.803. The law's announced target and principal purpose was to increase the admission of underrepresented minorities at UT. Because of the presence of de facto racial and ethnic segregation in Texas's high schools (*see* Pet. App. 57a n.150), the law succeeded in increasing the percentages of African-American and Hispanic enrollment at the school. Pet. App. 20a.

For the spots in the entering class not filled by the mechanical Top Ten Percent Law, UT employed a holistic process that considered applicants on an individualized basis. This holistic evaluation of applications did not explicitly consider applicants' racial or ethnic background, but it was nonetheless partially designed to increase minority enrollment by considering factors, such as socio-economic status, that were thought to be correlated with minority status. Pet. App. 121a.

In 2003, this Court in *Grutter* resolved a conflict in authority between the Fifth Circuit's decision in *Hopwood* and decisions from the Sixth and Ninth Circuits holding that institutions of higher education could, consistent with the Constitution, consider race in admissions in a narrowly tailored fashion to promote educational diversity. *Grutter* confirmed that colleges and universities may consider race as a "plus" factor as part of an individualized and holistic admissions process. 539 U.S. at 334.

Grutter thus rejected *Hopwood*'s sweeping prohibition on all consideration of race in university admissions and restored a measure of flexibility to public educational institutions within the Fifth Circuit (and elsewhere) seeking to achieve the educational benefits of diversity. UT thereafter reviewed whether to exercise that restored flexibility, commencing "several months of study and deliberation, including retreats, interviews, review of data of diversity in the classroom, and other factors." J.A. 396a; *see also* J.A. 432a.

Based on its review, in 2004 UT decided to add the consideration of race as one factor "within a larger admissions scoring index" used for its holistic process for evaluating those applicants who were not admitted pursuant to the Top Ten Percent Law. Pet. App. 23a. UT found that it had not yet achieved a "critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity." Pet. App. 23a.

When the Top Ten Percent Law was first implemented in 1998, about thirty-seven percent of UT's entering class consisted of in-state applicants admitted under the law. S.J.A. 31a. The percentage grew rapidly over the ensuing

decade. By the time this litigation commenced in 2008, about seventy percent of the entering class consisted of in-state applicants admitted pursuant to the Top Ten Percent Law. Accordingly, UT's *Grutter*-type holistic admissions process was used to select about thirty percent of its entering class.[5]

In 2010, the Texas Legislature imposed a cap on the use of the Top Ten Percent Law, providing that it could be used to fill at most three-quarters of those seats reserved for Texas residents. Pet. App. 19a; Tex. Educ. Code § 51.803(a-1). The statutory cap reflects a legislative

[5]These 2008 statistics differ from those contained in the district court's opinion and Petitioner's Brief for two reasons. First, the district court misread a table in the record as presenting data on total enrollment at UT; the table in fact presents data on enrollment of Texas residents only. *Compare* Pet. App. 129a *with* S.J.A. 159a (tbl. 2b). Second, we use University of Texas statistical tables published more recently than were included in the record in this case. These tables also contain enrollment data for other University of Texas campuses. Univ. of Texas System, Office of Inst'l Studies and Policy Analysis, *Facts and Trends 2010*, at 5, *available at* http://www.utsystem.edu/isp/StatHndbk/2010/FullReport.pdf.

This publication also shows that of the thirty percent enrolled through the holistic process in 2008, about one quarter—or almost eight percent of the entering class—were out-of-state residents of the United States and international students and thus about twenty-two percent of the entering class consisted of Texas residents selected by the *Grutter*-type holistic process. UT typically reserves about ten percent of the spaces in its entering class for out-of-state and international students as part of its commitment "to being an international institution." J.A. 188a. Of course, the top ten percent plan is completely infeasible for such students because UT cannot accommodate the top ten percent of all students outside Texas.

judgment that at least one-quarter of the seats reserved for Texas residents in UT's entering class, and thus about one-third of the total spaces in the entering class,[6] must now be filled through the holistic, individualized process. The statutory cap effectively arrested, and perhaps modestly reversed, the prior decade-long trend of rapid growth in the proportion of UT's entering class filled through the Top Ten Percent Law.

The statutory cap will automatically be lifted if any final court order prohibits UT from considering race in its holistic undergraduate admissions process. Tex. Educ. Code § 51.803(k)(1).

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment does not prohibit state colleges and universities from including race as a factor in a holistic, individualized admissions process in order to achieve the significant educational benefits that result from diversity within academic communities.

UT's use of race as a plus factor in a holistic, individualized admissions process would be upheld under *Grutter* if it were used to fill the institution's entire

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[6]Because about ninety percent of the entering class is reserved for Texas residents, the minimum of one-fourth of entering Texas residents who must be admitted pursuant to the holistic process equals about 22.5% of the total entering class ($.25 \times .90 = .225$). Adding the ten percent of the entering class made up by non-Texas residents gives a total of at least 32.5% percent of the entering class that must be filled through the holistic process, subject of course to year-by-year fluctuations in the applicant pool and in the decisions of admitted applicants to enroll.

entering class. The institution's choice to use the *Grutter*-type process for a subset of the spaces in its entering class, in conjunction with use of a mechanical percentage plan for another subset, is no less valid under the Constitution.

The decision of the court of appeals upholding UT's use of *Grutter*-type admissions process should be affirmed because it properly ensures equal protection of the laws, fosters academic freedom at institutions of higher learning, and respects the traditional role of States in developing differing solutions to difficult and important problems. This process reflects the balance originally struck by Justice Powell's opinion in *Bakke*, and reaffirmed by the Court in *Grutter*—a balance upon which the States have relied for almost thirty-five years.

The adoption of a percentage plan like the Top Ten Percent Law does not exhaust a State's compelling interest in pursuing the educational benefits of diversity. Although such a percentage plan can lead to increased racial and ethnic diversity under some circumstances, such plans have important limitations and deficiencies that may properly lead state colleges and universities, or state legislatures, either to reject them outright or to decide, as UT has done, to use them for only a portion of the entering class and to supplement them by selecting another portion of the class through a *Grutter*-type individualized, holistic admissions process.

A good-faith educational judgment about whether to adopt a percentage plan, a *Grutter*-type plan, or some combination of the two, is therefore one to which this Court should accord substantial weight. The educational judgment about how and whether to use a percentage plan

is informed by numerous factors, including the educational institution's mission, size, selectivity, and traditions, as well as the characteristics of the applicant pool, and many policy considerations. A public institution should have the flexibility to determine that *Grutter*-type individualized assessment of applicants serves as a useful complement to a percentage plan and offsets some of the percentage plan's drawbacks.

ARGUMENT

I. STRICT SCRUTINY ANALYSIS OF RACIAL CLASSIFICATIONS ALLOWS EDUCATIONAL INSTITUTIONS A MEASURE OF FLEXIBILITY IN FORMULATING ADMISSIONS PRACTICES TO FURTHER DIVERSITY

This Court has for decades recognized that the selection of students for admission to public colleges and universities implicates important principles of academic freedom in an area traditionally committed to the discretion of the States. *See Grutter*, 539 U.S. at 328-29. Therefore, although race-conscious admissions policies are subject to strict scrutiny under the Equal Protection Clause, in applying strict scrutiny in the context of public higher education, the Court has given "a degree of deference to a university's academic decision[]" that diversity among students is a compelling state interest, *id.* at 328, and has left room for a university to consider all aspects of its educational mission in selecting specific methods to achieve diversity, *id.* at 339-40. In particular, the Court has held that narrow tailoring does not require a university "to exhaust[] . . . every conceivable race-neutral alternative [or] . . . to choose between maintaining

a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* at 339.

Bakke and *Grutter* both emphasize that strict scrutiny does not require a court to blind itself to other, equally important, constitutional values. *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J.); *Grutter*, 539 U.S. at 328-29. On the contrary, the "fundamental purpose" of strict scrutiny is to "take 'relevant differences' into account." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995) (remanding for application of strict scrutiny consistent with opinion).

Citing principles of academic freedom and the superior expertise possessed by university officials in the area of admissions practices, the Court has recognized that university administrators must be given some flexibility, subject to defined limits, in designing admissions programs to achieve diversity and the many other goals of an institution of higher learning. Justice Powell's dispositive opinion in *Bakke*—which has become integrated into "the fabric of our law," *Johnson v. Transp. Agency, Santa Clara County,* 480 U.S. 616, 644 (1987) (Stevens, J., concurring), as well as the fabric of our university communities—accorded a degree of deference to a public university's judgment about the need to achieve diversity and its good-faith selection of a permissible method of doing so. *Bakke*, 438 U.S. at 312, 318-19 (opinion of Powell, J.). The Court's decision in *Grutter* reaffirmed that strict scrutiny analysis permits breathing room to be given to university administrators in designing admissions programs. 539 U.S. at 339-40; *see also id.* at 329 (a university's good faith is "'presumed'

absent 'a showing to the contrary'" (quoting *Bakke*, 438 U.S. at 318-19)).

Such breathing room is grounded, first and foremost, in long-standing constitutional principles of academic freedom. The Court has recognized that the academic freedom of our universities is a "transcendent value," and that its safeguarding is "a special concern of the First Amendment" to which "[o]ur Nation is deeply committed." *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967); *see also Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957). "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decisionmaking by the academy itself." *Regents of the Univ. of Mich. v. Ewing,* 474 U.S. 214, 226 n.12 (1985) (citations omitted) (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)). An institution's "selection of its student body" is an important component of this academic freedom. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). It is thus essential that universities retain "[d]iscretion to determine, on academic grounds, who may be admitted to study." *Ewing*, 474 U.S. at 226 n.12 (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)); *see also Grutter,* 539 U.S. at 328-29.

The need to accord respect to administrators' judgments about admissions policies, within boundaries, is further rooted in the Court's recognition that such judgments rely on specialized experience, knowledge, and expertise and are subject to ongoing revision and refinement based on conditions observed in the university community. Federal courts are not well-suited to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational

institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Ewing*, 474 U.S. at 226 (quoting *Board of Curators v. Horowitz,* 435 U.S. 78, 90 (1978)).

The admissions policies adopted by UT—which combine a mechanical percentage plan with a *Grutter*-type holistic admissions process—exemplify how state institutions' academic freedom allows them to fulfill the traditional role of the States as "laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring), *quoted in Grutter*, 539 U.S. at 342. An approach to equal protection analysis that prevents States from "experimenting and exercising their own judgment in [this] area to which States lay claim by right of history and expertise," *id.* at 583 (Kennedy, J., concurring), would significantly curtail public institutions' ability to nurture the intellectual atmosphere of "'speculation, experimentation and creation'" that the First Amendment aims to foster and protect, *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263).

For these reasons, the Court should harmonize the various constitutional interests at play here in the same manner that *Bakke* and *Grutter* did—by affording measured weight to UT's considered judgment regarding its need for greater diversity and its chosen method for achieving diversity. This does not dilute strict scrutiny analysis, but rather appropriately recognizes the special challenges posed by applying that analysis to review admissions policies and practices of public institutions of higher learning.

II. THIS COURT SHOULD RESPECT STATES' CONSIDERED EDUCATIONAL JUDGMENTS ABOUT WHETHER TO ADOPT PERCENTAGE PLANS FOR UNIVERSITY ADMISSIONS AND WHETHER TO SUPPLEMENT THEM WITH A *GRUTTER*-TYPE HOLISTIC APPROACH

In *Grutter*, this Court reaffirmed that public universities have "a compelling interest in obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. *Grutter* upheld as narrowly tailored a public institution's use of an individualized, holistic approach to admissions that took applicants' race and ethnicity into account in pursuing the educational benefits of diversity. *Id.* at 334.

The holistic approach endorsed by *Grutter* calls for the exercise of multifactored educational judgments on an applicant-by-applicant basis, and therefore resonates deeply with the tradition of academic freedom discussed in Point I. But narrow tailoring does not require all institutions seeking diversity to use a single universal admissions system. Neither the holistic *Grutter*-type approach nor the Top Ten Percent Law favored by petitioners is the only method by which institutions may pursue educational diversity.

Indeed, because of differences in their educational missions, histories, geographic locations, and sizes, and in the characteristics of their applicant pools, universities rely upon a variety of methods to attain diversity. Some public universities employ a *Grutter*-type plan in their admissions. Other universities may rely on a percentage plan to achieve some of the educational benefits of

diversity, or like UT, may employ a percentage plan in conjunction with a *Grutter*-type plan. The choice of which methods to use and in which combinations and proportions is quintessentially an academic judgment.

Petitioners assert that they do not contend that a percentage plan is constitutionally required, but argue only that, having adopted a percentage plan to fill a portion of the entering class, Texas is barred from complementing it with a *Grutter*-type approach to selecting students for the remaining spots in the class. Pet. Br. at 35 n.9. But the logic of that position is questionable. If the *use* of a percentage plan for part of the entering class makes a supplemental holistic approach unnecessary, or insufficiently tailored, to pass constitutional muster, then the *possibility* of using a percentage plan would seem to have the same effect. And on the other hand, if it is constitutionally permissible for a university to select its *entire* entering class through a holistic approach, even though a percentage plan might also produce a diverse student body, then it is hard to see why the university should be barred from using that same holistic approach to select *part* of the class, while using a percentage plan to select another part.

The Constitution does not require States to use percentage plans to achieve diversity. *Grutter*, 539 U.S. at 340. Nor does it require States to make an all-or-nothing choice between percentage plans and holistic plans. The choice among permissible methods to achieve diversity should be left to the discretion of state education officers, who are equipped by experience and expertise to assess how the various methods will work as to their particular applicant pools and how the results of those methods will promote the educational benefits of diversity.

A. Percentage plans have important disadvantages.

Percentage plans may have a role to play in university admissions, but they also have real and important limitations. In many places, and for many state colleges and universities, percentage plans may be ineffective in achieving racial and ethnic diversity. Even in those situations where percentage plans can succeed in increasing numerical diversity, there are sound reasons that state university administrators may either reject such plans or choose to supplement them with *Grutter*-type holistic plans, as UT has done.

1. Mechanical percentage plans that base admissions solely on high school class rank can be successful in achieving diversity gains only if specific underlying conditions are present. Most plainly, the ability of a percentage plan to enhance numerical diversity along racial and ethnic lines at a college or university depends on the presence of significant racial and ethnic segregation within the state high school system from which the applicant pool is drawn. *See Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting) ("[p]ercentage plans depend for their effectiveness on continued racial segregation at the secondary school level"). In addition, a percentage plan can succeed only if the population of seniors graduating with high class rank is sufficiently diverse.

Moreover, the success or failure of a mechanical percentage plan will also vary with the characteristics of the particular college or university: a percentage plan may produce different results at a flagship state university (like UT) from the results it would produce at a public college or university that is smaller, draws from

a narrower or different geographic area, or has a weaker reputation. First, the non-flagship schools may attract fewer members of the top ten percent, and second, the members they do attract may not be as diverse as at the flagship schools. The experience in Texas confirms this: in 2008, the Top Ten Percent Law filled seventy-six percent of the spots reserved for Texas residents at UT-Austin, but less than nine percent of those spots at UT-San Antonio, presumably because top ten percenters chose to enroll elsewhere.[7] And those top ten percenters who choose to enroll in a non-flagship school may not always enhance racial and ethnic diversity, if minority members of the top ten percent are vigorously and effectively recruited by private as well as public universities.

UT's experience further demonstrates that a percentage plan that produces numeric gains in racial and ethnic diversity university-wide may nonetheless fail to yield sufficient diversity within particular programs. *See* Pet. App. 56a ("minority students remain clustered in certain programs"). Petitioners characterize the concern for diversity within programs as a search for "diversity in every small classroom" (Pet. Br. 29), but they are mistaken. College and university officials may properly seek to provide students with the educational benefits of diversity as they engage in their academic work, and not merely as those students walk across the campus. *See Grutter*, 539 U.S. at 330 (emphasizing that

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[7]*Facts and Trends 2010*, supra, at 5-6; *see also id.* at 1 ("At . . . U. T. System institutions [other than Austin], the top 10% represented less than one-third of first-time enrolled students from Texas."). These statistics do not show whether or to what extent the Top Ten Percent Law contributes to racial and ethnic diversity at UT institutions other than UT-Austin.

one of diversity's substantial benefits is producing better classroom discussion). And to accomplish that goal, it is necessary to select a diverse student body for particular programs and courses of study, and not merely for the campus as a whole—particularly at a school like UT, where the undergraduate enrollment is exceptionally large and where students apply and are admitted to particular programs. *See* J.A. 164a.

Indeed, where students are admitted to particular programs, the Top Ten Percent Law may have the perverse effect of reducing racial and ethnic diversity in the most challenging programs, while it increases the numbers of minority entering students overall. Judge Higginbotham made precisely this point. Under the Top Ten Percent Law, "UT must admit a top ten percent student from a low-performing high school before admitting a more qualified minority student who ranks just below the top ten percent at a highly competitive school." Pet. App. 57a n.149. As a result, the diversity produced by the Law may be concentrated in less demanding programs and not in "difficult majors like business or the sciences." *Id.* For all of these reasons, percentage plans may fail to achieve the educational benefits of diversity, or have limited success in achieving those benefits, for many public colleges and universities.

2. Even when the conditions are present that would allow a mechanical percentage plan to achieve meaningful increases in racial and ethnic diversity at a particular university, an institution could reasonably reject the use of such a plan in the exercise of sound educational judgment. Percentage plans replace individualized admissions judgments with a mechanical rule based on

a single applicant characteristic: high school class rank. A public institution could reasonably wish to retain the ability to consider additional factors in its admissions decisions, including, for example, scores on standardized tests, strength of high school curriculum, extracurricular activities, and personal essays. For example, according to the University of North Carolina at Chapel Hill, implementation of a top ten percent plan at the institution would have only a marginal effect on racial diversity, and "would . . . depress almost every . . . indicator of academic quality," thereby resulting in "a significantly less satisfactory admissions system for UNC in most respects." Brief of Amicus Curiae The University of North Carolina at Chapel Hill Supporting Respondents, at 34.

Relatedly, the Court observed in *Grutter* that a percentage plan "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. The record here bears out that percentage plans are "at best a blunt tool for securing the educational benefits that diversity is intended to achieve." Pet. App. 61a; *see also* Pet. App. 57a ("the Top Ten Percent Law crowds out other types of diversity that would be considered under a *Grutter*-like plan").

3. State college and university officials may have additional policy reasons for rejecting percentage plans, even where such plans may be successful in achieving diversity gains. As noted above, a percentage plan for college or university admissions depends for its success in achieving diversity on a high degree of *de facto* racial segregation in a State's high schools. *See Grutter*, 539

U.S. at 340 ("assuming" without deciding that percentage plans are race-neutral). A State may reasonably choose not to rely on a plan with that feature, because it is in tension with the State's efforts to reduce segregation of its elementary and secondary schools.

Indeed, percentage plans may create incentives for students to undermine important educational goals of the secondary school system. Percentage plans may lead students to choose segregated schools, or less competitive schools, or less difficult high school courses in order to increase their chance of obtaining the benefit of the percentage plan. A recent study found that the Top Ten Percent Law encourages prospective and current high school students in Texas to choose less competitive high schools so as "to improve the chances of being in the top ten percent." Julie Berry Cullen, Mark C. Long & Randall Reback, *Jockeying For Position: Strategic High School Choice Under Texas' Top Ten Percent Plan* 3 (NBER Working Paper No. 16663, 2011), *available at* http://www.nber.org/papers/w16663.

Thus, mechanical percentage plans carry drawbacks that may lead States and their colleges and universities to reject them, even where such plans could be successful in achieving gains in racial and ethnic diversity.

B. A State may adopt a hybrid system that selects part of a class through a percentage plan and part through a *Grutter*-type plan.

The shortcomings and limitations of mechanical percentage plans, as outlined above, may lead state university administrators to reject the use of such plans,

or they may instead provide sound reasons to supplement a percentage plan with complementary admissions policies to pursue racial and ethnic diversity. The States' colleges and universities should be given the flexibility to employ percentage plans in combination with a holistic *Grutter*-type admissions policy, as UT has done.

Petitioner's effort to excise UT's *Grutter*-type admissions policy from the institution's overall plan to achieve diversity is misguided. Were UT to employ a *Grutter*-type program to fill its entire entering class, the plan would indisputably qualify as narrowly tailored under the Court's precedents. The result should be no different merely because UT is using the *Grutter*-type policy only as to the subset of its entering class that is not filled through the Top Ten Percent Law.

By using a holistic, individualized evaluation process to fill the spaces remaining in its entering class after application of the Top Ten Percent Law, UT enhances its overall ability to realize the educational benefits of diversity. The holistic process, unlike the mechanical percentage plan, allows UT to pursue diversity "along all the qualities valued by the university," *Grutter*, 539 U.S. at 340, rather than merely replicating whatever diversity there happens to be in the population of students finishing in the top ten percent of their respective high school classes. The holistic approach enables academic judgments to be made on an individualized basis as to some percentage of applicants, thereby mitigating the effects of the percentage plan's mechanical nature. The approach therefore complements the percentage plan by allowing for the admission of some students (both those from underrepresented groups and others) who fall below

the percentage cut-off at their particular schools, but who are nevertheless as qualified as, or more qualified than, other applicants automatically admitted under the percentage plan.

The *Grutter*-type holistic approach also allows UT to strive for greater racial and ethnic diversity in specific academic programs and in students' classroom experiences, rather than merely achieving numeric diversity in campus-wide demographics. For example, the record here shows that the holistic policy enables UT to admit underrepresented minorities whose applications or whose interests and talents indicate that they will enroll in programs and courses that otherwise lack racial and ethnic diversity. *See* Pet. App. 57a n.149.

The holistic policy further permits UT to calibrate its overall admissions program on an ongoing basis through periodic review of the characteristics of its academic communities. As the Court of Appeals observed, "some year-to-year fluctuation in enrollment numbers is inevitable . . . [and] the University needs to maintain critical mass in years when yield [from the Top Ten Percent Law] is low just as it does when yield is high." Pet. App. 68a; *cf. Facts and Trends 2010*, supra, at 5-6 (showing significant annual fluctuations in enrollment from Top Ten Percent Law across the University of Texas system from 2005-2009).

As UT's example shows, States should be permitted to exercise their educational judgment to decide that these and other important benefits of a *Grutter*-type admissions policy, employed as a complement to a mechanical percentage plan, may create a stronger

admissions policy than a mechanical percentage plan standing alone. The educational judgment about whether the "blunt tool" of a percentage plan (Pet. App. 61a) is sufficient to attain the educational benefits of diversity, or whether some additional and complementary policy should also be pursued, is an academic judgment best made by universities, not courts.

Moreover, courts are ill-suited to second-guess a university's judgment about the appropriate allocation of spaces in its entering class between the percentage-based and holistic components of its admissions program. The judgment about how many admissions slots should be filled using a percentage plan depends on many factors, including what percentile in class rank entitles applicants to automatic admission, how that number was selected, the desirability of the particular institution employing the plan, and particular applicant choices in any given admissions year. For example, as the experience of Texas shows, a statewide percentage plan is likely to fill a far smaller percentage of available undergraduate slots at some of the State's colleges and universities than the same plan fills at a State's flagship university. See supra at 16. Thus, either component of a combined approach may have a limited impact on diversity at any particular college or university.

Contrary to petitioners' arguments (Br. at 38-42), the fact that the complementary and compensatory benefits of the *Grutter*-type component of an admissions program may be limited at a particular institution, because the holistic approach applies only to a subset of admissions decisions, should not lead a court to excise the *Grutter*-type approach from the institution's admissions program.

The same observation could equally support expanding the *Grutter*-type component of the admissions program and reducing the scope of the percentage plan—as Texas has now done by enacting a legislative cap on the proportion of UT's enrollment reserved for Texas residents that may be filled through the percentage plan. Because a percentage plan and a *Grutter*-type approach are both constitutionally permissible methods to achieve the educational benefits of diversity, determinations about precisely where to strike the balance between the percentage-based and holistic components of an admissions program, and decisions about the exact point at which the benefits of a *Grutter*-type component may become too small to justify its continued use, should be left to university administrators in the exercise of their considered academic judgment.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit upholding the constitutionality of UT's admissions program should be affirmed.

Respectfully submitted,

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